APPENDIX A

In the

UNITED STATES COURT OF APPEALS

for the Fifth Circuit

No. 23081

HERMAN J. HEIDRICH,

Appellant,

versus

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Southern District of Florida.

(November 14, 1966.)

Before WISDOM, BELL and GODBOLD, Circuit Judges.

PER CURIAM: The defendant-appellant, Herman J. Heidrich, was convicted of tax evasion under 26 U.S.C.A. §§7201 and 7206(1), fined $15,000, and sentenced to imprisonment for ninety days to be followed by probation for nine months. He moved to suspend execution of the confinement part of the sentence on the ground that his wife would suffer a fatal heart attack if he were sent to prison. Heidrich supported this motion with two medical reports on the state of his wife's health. The court below denied the motion to suspend the sentence of confinement, but reduced the confinement from ninety to sixty days.

We hold that the court did not abuse its discretion by sentencing Heidrich to sixty days. Under the statute, the court had authority to sentence the defendant to five years in prison. The record clearly shows that the court consid-

ered the health of the defendant's wife. The record fails to support the appellant's contention that the court, disregarding its discretionary powers under the probation statute, 18 U.S.C.A. §3651, adhered inflexibly to an alleged policy of automatically imposing imprisonment upon those guilty of tax evasion.

The judgment of the lower court is

AFFIRMED.

* * *

APPENDIX B

[TITLE OMITTED]

Before WISDOM, BELL and GODBOLD, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

November 14, 1966

Issued as Mandate:

APPENDIX C

[TITLE OMITTED]

(March 21, 1967.)

ON PETITION FOR REHEARING

Before WISDOM, BELL, and GODBOLD, Circuit Judges.

PER CURIAM: The record in this case shows that the Court conducted a probation hearing and granted probation to the co-defendant, Feurbacher, without actual imprisonment. The other defendants, including Heidrich, received split sentences — probation and imprisonment. In these circumstances it is apparent that the district court did not consider that the policy of requiring jail time for all defendants convicted of income tax evasion was an inflexible rule having the effect, as suggested in the dissent, of amending 18 U.S.C. § 3651. It is ordered that the petition for rehearing filed in the above entitled and numbered cause is hereby DENIED.

GODBOLD, Circuit Judge, dissenting:

I am mindful that the application for rehearing is another of many efforts to avoid serving a short confinement for income tax evasion. The fact remains that it should be granted.

As part of the record on appeal the parties stipulated to a narrative account of proceedings at which the trial court heard a motion of the defendant for suspension of the confinement portion of his sentence, stating a transcript

thereof is unavailable. The stipulation[1] raises a question of law.

If there existed a policy of giving jail time to all income tax violators, removing or limiting the discretion of the court to grant probation, a sentence given pursuant thereto is invalid on proper attack. A defendant is entitled to be sentenced in accordance with the applicable statutes, including the probation statute, 18 U.S.C.A. 3651. The sentencing court is granted a high degree of flexibility, and probation is, of course, a privilege and not a right. *Burns v. United States*, 287 U.S. 216, 77 L.Ed. 286, 53 S. Ct. 154 (1932). The decision of the district court will not be disturbed except for abuse of discretion, *Mann v. United States*, 218 F.2d 936 (4th Cir., 1955); *Dodd v. United States*, 213 F.2d 854 (10th Cir., 1954). Nevertheless the flexibility and discretion granted the sentencing court are to enable it to consider each case on its merits: "It is necessary to individualize each case, to give that careful, humane and comprehensive consideration to the particular situation of each offender which could be possible only in the exercise of a broad discretion. The provisions of the [Probation] Act are adopted to this end." *Burns v. United States, supra*, 287 U.S. at 220.

The courts have no power to amend §3651. Unless an

[1]"7. The Court, while acknowledging the bona fides and good faith of the defendant, and the mitigating circumstances present in the case, refused to suspend execution of the jail portion of the defendant's sentence, indicating that, for some time, the judges of the Southern District of Florida had strictly adhered to a requirement of jail time for all defendants convicted of income tax evasion, as a deterrent to others. The court indicated that it would, because of the unusual circumstances of the case, delay the commencement of service of the defendant's sentence until August 30, 1965. It would not, however, entirely suspend and leave the defendant with fine and probation alone."

offender is ineligible for probation under the terms of that section or some other statute the court must consider on the merits of the specific situation whether, in the words of the statute, "the ends of justice and the best interests of the public as well as the defendant" will be served by placing him on probation.[2]

If it is true, as defendant claims, that the District Court by policy has added to §3651 an additional category of offenders not eligible for probation, the situation would call for exercise of our supervisory power.[3]

I doubt that the majority disagree with any of the above requirements and policies of sentencing. Presumably they feel the policy as described in the stipulation is not of such inflexibility as to be improper.[4] Whether we believe

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[2]The deterrent effect of a jail sentence is sometimes given great weight in income tax cases. See Wright, Sentencing the Income Tax Violator: Statement of Basic Problem, 30 F.R.D. 302 (Fifth Circuit Sentencing Institute, 1961). But emphasizing deterrent effect of jail sentences in tax cases is different from eliminating tax violators from consideration for probation. See Miller, Sentencing the Income Tax Violator: Violations Not Related to Other Crimes, 30 F.R.D. 310, 314 (Fifth Circuit Sentencing Institute, 1961): "In [the income tax offender] field, as in all others, the case must be considered ad hoc. There should be no tailor-made sentences or rules of thumb. The sentence should not in any manner be predetermined by an arbitrary standard or formula."

[3]*Thomas v. U.S.*, 368 F.2d 941 (5th Cir., 1966).

[4]On appeal the defendant rested without objection on the stipulation in lieu of a transcript. On application for rehearing he claims for the first time that failure of the court reporter to record the proceedings prejudiced him because it would have shown an unqualified statement that the alleged policy did exist. There is no prejudice in this regard, for that is precisely what the stipulation says; the defendant does not suffer because of the form in which the statement referring to the policy comes to us. A record should have been taken. 28 U.S.C.A. 753(b); Cf. *United States v. Taylor*, 303 F.2d 165 (4th Cir., 1962). Mere failure to transcribe a record is not reversible error per se, e.g., *Burns v. United States*, 323 F.2d 269 (5th Cir., 1963); *Addison v. United States*, 317 F.2d 808 (5th Cir., 1963), but where it appears

such a policy does or does not exist is immaterial so long as the stipulation indicates it does.

It is stated in brief and oral argument that the co-defendant was given probation, proving the alleged policy did not exist. This does not appear of record, nor do we know who sentenced the co-defendant, hence this would not settle the issue of possible prejudice to this defendant—if the policy existed, and was applied to this defendant, the sentence was illegal; if the policy did not exist but the judge who sentenced this defendant thought it did, and applied it, the sentence was illegal. The invalidity would exist whether the alleged policy was applied from understanding or misunderstanding.

Failure to show "inflexible adherence" to a policy of confinement, referred to in our original opinion, does not solve the issue. If there was a policy which partially deprived the judge (or which he thought partially deprived him) of his statutory discretion concerning confinement, it would be illegal, just as one which totally stripped him of discretion.

The case should be remanded for re-sentencing, with instructions that no consideration be given to any policy, *if there be such*, limiting the discretion given by law to the sentencing judge. This the defendant is entitled to; it would be a far more satisfactory procedure than remand-

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likely that some error did occur and the absence of a transcript prevents the reviewing court from determining whether any such error was prejudicial, relief has been granted. *Fowler v. United States*, 310 F.2d 66 (5th Cir., 1962); *Stephens v. United States*, 289 F.2d 308 (5th Cir., 1961).

ing for a factual hearing on what was or was not said at the proceeding covered by the stipulation.[5]

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APPENDIX D

18 U.S.C. § 3651. **Suspension of sentence and probation**

Upon entering a judgment of conviction of any offense not punishable by death or life imprisonment, any court having jurisdiction to try offenses against the United States when satisfied that the ends of justice and the best interest of the public as well as the defendant will be served thereby, may suspend the imposition or execution of sentence and place the defendant on probation for such period and upon such terms and conditions as the court deems best.

Upon entering a judgment of conviction of any offense not punishable by death or life imprisonment, if the maximum punishment provided for such offense is more than six months, any court having jurisdiction to try offenses against the United States, when satisfied that the ends of justice and the best interest of the public as well as the defendant will be served thereby, may impose a sentence in excess of six months and provide that the defendant be confined in a jail-type institution or a treatment institution for a period not exceeding six months and that the execution of the remainder of the sentence be suspended and the defendant placed on probation for such period and upon such terms and conditions as the court deems best.

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[5]Cf. *Fowler v. United States*, 310 F.2d 66, (5th Cir., 1962); *Stephens v. U.S.*, 289 F.2d 308 (5th Cir., 1961).

Probation may be granted whether the offense is punishable by fine or imprisonment or both. If an offense is punishable by both fine and imprisonment, the court may impose a fine and place the defendant on probation as to imprisonment. Probation may be limited to one or more counts or indictments, but, in the absence of express limitation, shall extend to the entire sentence and judgment.

The court may revoke or modify any condition of probation, or may change the period of probation.

The period of probation, together with any extension thereof, shall not exceed five years.

While on probation and among the conditions thereof, the defendant—

May be required to pay a fine in one or several sums; and

May be required to make restitution or reparation to aggrieved parties for actual damages or loss caused by the offense for which conviction was had; and

May be required to provide for the support of any persons, for whose support he is legally responsible.

The defendant's liability for any fine or other punishment imposed as to which probation is granted, shall be fully discharged by the fulfillment of the terms and conditions of probation. As amended June 20, 1958, Pub.L. 85-463, § 1, 72 Stat. 216; Aug. 23, 1958, Pub.L. 85-741, 72 Stat. 834.

APPENDIX E

26 U.S.C. § 7201. Attempt to evade or defeat tax

Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution. Aug. 16, 1954, 9:45 a.m., E.D.T., c. 736, 68A Stat. 851.

26 U.S.C. § 7206. Fraud and false statements

Any person who—

(1) Declaration under penalties of perjury.—Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter; or

(2) Aid or assistance.—Willfully aids or assists in, or procures, counsels, or advises the preparation or presentation under, or in connection with any matter arising under, the internal revenue laws, of a return, affidavit, claim, or other document, which is fraudulent or is false as to any material matter, whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim, or document; or

(3) Fraudulent bonds, permits, and entries.—Simulates or falsely or fraudulently executes or signs any bond, permit, entry, or other document required by the provisions of the internal revenue laws, or by any regulation made in pursuance thereof, or procures the same to be falsely or fraudulently executed, or advises, aids in, or connives at such execution thereof; or

(4) Removal or concealment with intent to defraud.—Removes, deposits, or conceals, or is concerned in removing, depositing, or concealing, any goods or commodities for or in respect whereof any tax is or shall be imposed, or any property upon which levy is authorized by section 6331, with intent to evade or defeat the assessment or collection of any tax imposed by this title; or

(5) Compromises and closing agreements.—In connection with any compromise under section 7122, or offer of such compromise, or in connection with any closing agreement under section 7121, or offer to enter into any such agreement, willfully—

(A) Concealment of property. — Conceals from any officer or employee of the United States any property belonging to the estate of a taxpayer or other person liable in respect of the tax, or

(B) Withholding, falsifying, and destroying records.—Receives, withholds, destroys, mutilates, or falsifies any book, document, or record, or makes any false statement, relating to the estate or financial condition of the taxpayer or other person liable in respect of the tax;

shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $5,000, or imprisoned not more than 3 years, or both, together with the costs of prosecution. Aug. 16, 1954, 9:45 a.m., E.D.T., c. 736, 68A Stat. 852.

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APPENDIX F

28 U.S.C. § 753. **Reporters**

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(b) One of the reporters appointed for each such court shall attend at each session of the court and at every other proceeding designated by rule or order of court or by one of the judges, and shall record verbatim by shorthand or by mechanical means: (1) all proceedings in criminal cases had in open court; (2) all proceedings in other cases had in open court unless the parties with the approval of the judge shall specifically agree to the contrary; and (3) such other proceedings as a judge of the court may direct or as may be required by rule or order of court or as may be requested by any party to the proceeding.

The reporter shall attach his official certificate to the original shorthand notes or other original records so taken and promptly file them with the clerk who shall preserve them in the public records of the court for not less than ten years.

Upon the request of any party to any proceeding which has been so recorded who has agreed to pay the fee there-

for, or of a judge of the court, the reporter shall promptly transcribe the original records of the requested parts of the proceedings and attach to the transcript his official certificate, and deliver the same to the party or judge making the request. He shall also transcribe and certify all pleas and proceedings in connection with the imposition of sentence in criminal cases and such other parts of the record of proceedings as may be required by rule or order of court.

The reporter shall promptly deliver to the clerk for the records of the court a certified copy of any transcript so made.

The transcript in any case certified by the reporter shall be deemed prima facie a correct statement of the testimony taken and proceedings had. No transcripts of the proceedings of the court shall be considered as official except those made from the records taken by the reporter.

The original notes or other original records and the copy of the transcript in the office of the clerk shall be open during office hours to inspection by any person without charge.

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June 25, 1948, c. 646, 62 Stat. 922, as amended Oct. 31, 1951, c. 655, § 46, 65 Stat. 726; June 28, 1955, c. 189, § 3(c), 69 Stat. 176; June 20, 1958, Pub.L. 85-462, § 3(c), 72 Stat.207; July 7, 1958, Pub.L. 85-508, § 12(e), 72 Stat. 348; July 1, 1960, Pub.L. 86-568, Title I, §116(c), 74 Stat. 303.